

CALIFORNIA BOARD OF LEGAL SPECIALIZATION OF THE STATE BAR OF CALIFORNIA



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APPELLATE LAW CERTIFICATION EXAM

Date	Sunday, August 14, 2005 9:00 a.m. – 4:00 p.m.
Registration deadline	Friday, July 1, 2005
Exam sites	Westin at San Francisco Airport Radisson at Los Angeles Airport
Fee	\$300 writing (\$350 if using a laptop PC) <i>fee includes a box lunch</i>
Exam format	<p>The exam is divided into two three-hour sessions – the morning session includes 50 multiple-choice questions and two essay questions; the afternoon session includes four essay questions. There are no optional questions; each examinee is expected to answer all questions on the exam. Appellate Law examinees may choose to take either the civil or criminal version of the exam.</p> <p>The 50 multiple-choice questions, worth three points each, are designed to be answered in approximately 90 minutes. Each essay question is worth 75 points and is designed to be answered in approximately 45 minutes.</p>
Scoring	The maximum number of points available is 600. A passing score is 420 points, or 70%. Exams with scores between 65-70% are re-read by a Committee of Reappraisers. The decision of the Committee is final, pursuant to section 8.3 of the Rules Governing the State Bar of California Program for Certifying Legal Specialists. Results are mailed only after all reappraisals have been completed.
Reference materials	No reference materials are allowed during the exam.
Testing accommodations	Available at both sites. Contact ivonne.broussard@calbar.ca.gov or (415) 538-2145 for more information.
Study resources	See attached standards for certification, exam specifications, and sample exam questions.

For more information, visit www.californiaspecialist.org

THE STANDARDS FOR CERTIFICATION AND RECERTIFICATION IN APPELLATE LAW

(last revised effective 7/24/04)

1.0 DEFINITION

Appellate law is the practice of law dealing with procedural and substantive aspects of matters before state and federal appellate courts. "State and federal appellate courts" are: The United States Supreme Court, the California Supreme Court, the federal Court of Appeals, the California Court of Appeal or comparable appellate court.

2.0 TASK REQUIREMENT FOR CERTIFICATION

An applicant must demonstrate that within five (5) years immediately preceding the initial application he or she has been substantially involved in the practice of appellate law. Substantial involvement includes, but is not limited to, advising clients with regards to appeals, identifying appealable orders, designating, reviewing and evaluating the record, preparing briefs, appellate motions, petitions for extraordinary writ, petitions for review, habeas corpus petitions and presenting oral arguments.

- 2.1 An applicant must submit a total of 125 points, at least 75 of which must be accumulated during the five years immediately preceding the initial application.

- 2.1.1 **Briefing** -- Each attorney who is substantially involved in a matter in an appellate court and has substantial responsibility for most or all of the following activities can claim credit: Reviewing the record; researching the law; analyzing the issues; writing a procedural history, a statement of facts, and writing legal arguments.
- 2.1.1.1 Attorneys responsible for handling an appeal or cross-appeal on behalf of an appellant including preparation of the opening brief -- 5 points. No more than three (3) briefs under People v. Wende (1979) 25 Cal.3d 436 or Anders v. California (1976) 386 U.S. 738; 18 L.Ed.2d 493; 87 S.Ct. 1396 may be used in this category.
- 2.1.1.2 Attorneys responsible for handling appeals on behalf of a respondent or cross-respondent including preparation of the respondent's brief -- 4 points.
- 2.1.1.3 Attorneys responsible for handling a petition for extraordinary writ or a petition for writ of habeas corpus filed in an appellate court -- 3 points. If heard on the merits after issuance of an order to show cause or an alternative writ -- an additional 2 points.
- 2.1.1.4 Attorneys responsible for preparing preliminary opposition to petition for writ -- 1 point. If court issues alternative writ or order to show cause

requiring answer and additional briefing -- an additional 3 points.

- 2.1.1.5 Attorneys responsible for supervisory handling of an appeal or writ -- 3 points. This requires supervision over issue selection, strategy decisions, organization and revision of drafts. Only one attorney may claim supervisory credit for each appeal or writ.
- 2.1.1.6 Attorneys responsible for handling a matter in the California Supreme Court or the United States Supreme Court.
- 2.1.1.6.1 Responsible for preparing a petition for review or certiorari -- 2 points. If the attorney's initial substantial involvement in the appeal occurred after decision in the Court of Appeal -- an additional 2 points.
- 2.1.1.6.2 Answer to petition for review or certiorari -- 1 point. If the attorney's initial substantial involvement in the appeal occurred after review or cert was granted -- an additional 2 points.
- 2.1.1.6.3 Review or certiorari granted and attorneys responsible for preparing briefs on the merits -- 3 additional points. If the attorney's initial involvement in the appeal occurred after decision in the Court of Appeal -- an additional 2 points.
- 2.1.1.6.4 Attorneys responsible for preparing opposing brief on the merits in the California Supreme Court or the United States Supreme Court -- 3 points. If the attorney's initial substantial involvement in the appeal occurred after review or cert was granted -- an additional 2 points.
- 2.1.1.7 Attorneys responsible for preparing substantive Amicus Curiae Brief -- 2 points. Reply to amicus curiae brief -- 1 additional point. If the attorney's initial substantial involvement in the appeal occurred after decision in the Court of Appeal -- 1 additional point.

2.1.2 Conducted or participated in a court supervised appellate settlement conference on an appeal -- 1 point.

2.1.3 Oral argument in the California Supreme Court or the U.S. Supreme Court -- 2 points. If the attorney's initial substantial involvement in the appeal occurred after the decision in the Court of Appeal -- 2 additional points.

2.1.4 Judicial Service/Research Attorney

2.1.4.1 If the applicant was previously employed as an appellate justice in any of the courts listed in section 1.0, 40 points per year shall be awarded for each year of service.

2.1.4.2 If the applicant has been employed as a research attorney or judicial law clerk in any of the courts listed in section 1.0, 25 points per year shall be awarded for each year of service up to a three (3) year maximum.

2.2 Oral Argument -- Attorney must have presented 7 oral arguments, during a career, in any of the courts listed in section 1.0.

2.2.1 Oral argument must involve some discussion of the case other than a mere inquiry as to whether the court has questions.

2.2.2 Service of at least one full year as an appellate justice may be substituted for this requirement.

2.3 Alternative or additional forms of appellate practice may be called to the attention of the Advisory Commission for consideration in fulfilling the requirements of substantial involvement.

3.0 EDUCATIONAL REQUIREMENT FOR CERTIFICATION

An applicant must show that, within the three (3) years immediately preceding application, he or she has completed not less than forty-five (45) hours of approved educational activities as follows:

3.1 Not less than twenty (20) of the required hours must be in appeals and writs;

3.2 The remaining hours may be in any combination of pre-trial, trial, or post-trial practice and procedure, or substantive law topics.

For purposes of this section, approved educational activities may include educational activities approved for either MCLE or legal specialist credit.

4.0 TASK REQUIREMENT FOR RECERTIFICATION

An applicant for recertification must show that during the current five (5) year certification period he or she has had direct and substantial participation in the practice of appellate law. Such showing shall be made by compliance with the requirements as set forth in sections 2.1 and 2.3, by accumulating at least 63 points during the current certification period. At the discretion of the Commission, the task requirement may be deemed fulfilled by sworn statement that the applicant has engaged in the practice of appellate law substantially to the same extent as described in the application for original certification.

5.0 EDUCATIONAL REQUIREMENT FOR RECERTIFICATION

An applicant for recertification must show that, during the current five (5) year certification period, he or she has completed not less than sixty (60) hours of approved educational activities as follows:

5.1 Not less than twenty-five (25) of the required hours must be in appeals and writs;

5.2 The remaining hours may be in any combination of pre-trial, trial, or post-trial practice and procedure, or substantive law topics.

For purposes of this section, approved educational activities may include educational activities approved for either MCLE or legal specialist credit.

Specifications For State Bar of California Appellate Law Certification Examination

Purpose of the Examination: The Appellate Law Examination consists of a combination of essay and multiple-choice questions. It is designed to verify the applicant's knowledge of and proficiency in the usual appellate law and procedures that should be common to specialists in the field as represented by the skills listed below. We recognize that these skills are interrelated, which may require that you apply several skills in responding to a single exam question. Also, the order of the skills does not reflect their relative importance, nor does the skill sequence represent an implied order of their application in practice.

Your answers to the exam questions should reflect your ability to identify and resolve issues, apply the law to the facts given, and show knowledge and understanding of the pertinent principles and theories of appellate law, their relationship to each other, and their qualifications and limitations. Of primary importance for the essay questions will be the quality of your analysis and explanation.

Knowledge of the following fundamental lawyering skills may be assessed:

Skill 1: Professional Responsibility

- 1.1 Duties to clients, opposing counsel and the Court
- 1.2 Bases for attorney's fees/costs
- 1.3 Bases for sanctions
- 1.4 Fee agreements
- 1.5 Arbitration/mediation and dual representation
- 1.6 Conduct resulting in malpractice/discipline
- 1.7 Conflicts of interest

Skill 2: Pre-Briefing

- 2.1 Preserving issues in the trial court
- 2.2 Appealability
- 2.3 Standing
- 2.4 Notice of appeal and cross appeals
- 2.5 Timing of notice of appeal/cross appeal
- 2.6 Designation and preparation of the record on appeal
- 2.7 Perfecting record on appeal

Skill 3: Motions

- 3.1 Applications, motions and requests
- 3.2 Stays, supersedeas, appeal bonds/bail
- 3.3 Correction/augmentation of the record on appeal
- 3.4 Judicial notice

Skill 4: Briefing

- 4.1 Reviewing the record
- 4.2 Spotting issues
- 4.3 Legal research
- 4.4 Issue selection, strategy and waiver
- 4.5 Overcoming procedural problems
- 4.6 Drafting and reviewing the brief
- 4.7 Filing and service requirements
- 4.8 Standard of review
- 4.9 Standard of prejudice

Skill 5: Post-Briefing

- 5.1 Supplemental briefing
- 5.2 Oral argument
- 5.3 Petitions for rehearing
- 5.4 Petitions for review
- 5.5 Remittitur

Skill 6: Writs

- 6.1 Appropriate petitions for extraordinary writs
- 6.2 Procedural requirements for extraordinary writs
- 6.3 Review of writ orders

STATE BAR OF CALIFORNIA APPELLATE LAW CERTIFICATION EXAM

SAMPLE QUESTIONS

Sample Question #1 – Civil

Dello Sporting Goods (D) is a small athletic supply store in Slotown, California. California Polyanna College (P) is a four-year college situated in Slotown and part of the California College system of fifteen other colleges throughout the state operated through a Board of Trustees. Since 1901, the general public in Slotown has referred to P as “Poly.” To show support for the local college, D has sold products such as hats, shirts and sweatshirts bearing the name “Poly” since it opened its doors in 1940.

In 1980, California College Code §101 was enacted, which provides that “no person shall use the name ‘California College’ or any abbreviation of it without the permission of the trustees of the college.” State and federal trademark law defines a trademark as a name used by a merchant or company that distinguishes its goods or services from another’s goods or services. Trademark law also provides that no person or company may use a trademark of another without the permission of the owner of the trademark. Whether a name or words is a protectable trademark is a question of fact.

In January 2003, P sued D for federal and state trademark infringement and violation of College Code §101, seeking injunctive relief under both causes of action. After filing the complaint, P brought a pretrial motion for a preliminary injunction seeking an order enjoining D from selling products bearing the name “Poly” on the ground “Poly” is an abbreviation of “California College” and protected under College Code §101. The motion was denied.

After denial of the preliminary injunction, P brought a motion for summary judgment pursuant to Code of Civil Procedure §437 (c), on the ground that “Poly” was a protectable trademark under federal and state trademark law as a matter of law because “Poly” had obtained secondary meaning in the community. P did not address the College Code because of the trial court’s initial ruling on the preliminary injunction. The trial court granted the motion for summary judgment and issued an order articulating its reasons for the ruling, specifically referring to the evidence which indicated to the trial court that no triable issue of fact existed. Judgment was entered in favor of P

enjoining D from selling products bearing the name “Poly”.

D appealed. After entry of judgment but before briefs were filed, the state legislature amended College Code §101 expressly providing that “Poly” is a name protected under §101.

D argues in its opening brief that the trial court committed error in granting the motion for summary judgment because there remained a triable issue of fact as to whether the name “Poly” is a protectable trademark.

- A. Before P moves for summary judgment, does P have any appellate rights as to the denial of the motion for preliminary injunction? If so, what is the standard of review? Discuss.**
 - B. Assuming D’s argument is legally correct that the trial court committed error because there remained a triable issue of fact, what argument should P make to preserve the judgment notwithstanding the trial court’s error? Discuss.**
 - C. How should the Court of Appeal respond to P’s argument? Discuss.**
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Sample Question #2 – Civil

As she was walking down the street on the way to work, Patty accidentally bumped into Dennis. Enraged by this indiscretion, Dennis threw a cup of hot coffee onto Patty, who staggered backward into the street where she was struck by a passing motorist, sustaining serious injuries. Patty thereafter filed a civil suit for battery against Dennis.

Following the presentation of evidence, the jury is instructed. After two days of deliberations, the jury determines that it is split 8-4 in favor of Patty. At this time, both Juror Number 1 and Juror Number 2 indicate that, based on their religious beliefs, they do not believe they can sit in judgment of another person. The judge then instructs all jurors that they are to base their decision on the evidence and the Court’s instructions alone. Juror Number 1 agrees

to do so; Juror Number 2, however, indicates that she believes that she has to follow God's law. Defense counsel moves for a mistrial, but the Court instead chooses simply to replace Juror Number 2 with Alternate Number A. Shortly after replacing Juror Number 2, the jury returns a 9-3 verdict in favor of Patty.

After the verdict but before the bifurcated trial on damages, the Jury Foreperson (Juror Number 4) informs the Court that, before the jury had deadlocked, Juror Number 3 visited the intersection where the battery allegedly occurred and told the rest of the jury panel that it was extremely unlikely that the incident could have happened as Patty testified. This issue is raised properly in Dennis's motion for new trial, which is denied by the trial court.

At the conclusion of the case, Juror Number 4 telephones defense counsel and indicates that, during deliberations, he had done some research on the internet and found a newspaper article that said Dennis had suffered a prior conviction for assault with a deadly weapon in a highly publicized case. Juror Number 4 states that he did not share this information with the remaining jurors, but that he was not sure whether it affected his decision.

Assume a timely notice of appeal has been filed.

As to Jurors Number 1 through 4:

- A. Identify each claim of error and discuss whether each may be considered on direct appeal.
- B. Identify the appropriate standard of review. Discuss.
- C. Briefly analyze whether each claim of error is likely to succeed. Discuss.

Sample Question #3 – Civil

In January 2002, Port, Inc., represented by the Pond Law Firm, sued Dandy Corporation for misappropriation of trade secrets. Dandy Corporation hired the firm of Dohr & Dohr (D&D) to represent them. D&D is a 20-lawyer "boutique," and is the best-known firm in the area for defense of trade secret cases.

The litigation was highly contentious from the very beginning. Discovery was extensive and involved "sensitive" disclosures by both sides, with many documents exchanged in discovery under strict

confidentiality conditions. A five-week trial is scheduled for January 2004.

In March 2003, D&D learned that one of their former partners, a Certified Appellate Specialist who had left the D&D firm in 2002 to open her own office, became "of counsel" to the Pond Law Firm to do their appeals. In April 2003, D&D filed a motion to disqualify the Pond Law Firm from representing Port, Inc., based on the fact that one of their former partners presently serves as an appellate lawyer for the Pond Law Firm. The superior court heard the motion in June 2003 and granted the motion.

- A. What, if any, are Port, Inc.'s remedies in connection with the Pond Law Firm's disqualification in the Court of Appeal? Discuss.**
- B. What, if any, ethical issues are presented by the Certified Appellate Specialist's association with the Pond Law Firm? Discuss.**

Sample Question #4 – Civil

A jury found that Dalia unlawfully sold quarantine, a very dangerous chemical, to Pete, who was severely injured when he failed to take the necessary precautions to handle the material safely. Dalia appeals from the judgment, contending that the trial court erred in precluding her from presenting a defense focusing on the fact that Pete had passed the safety course necessary to become a licensed quarantine hauler. When precluded from tendering the defense, Dalia's counsel became extremely irate and ranted that the statute contemplated exactly such a defense. Defense counsel was nearly sanctioned during the tirade on how the court's ruling was unfair, violated due process, and essentially ended the case for Dalia. Deterred by the threat of sanction, defense counsel did not renew the objection when the trial court failed to instruct on this defense. The respondent's brief argues that it is irrelevant whether the statute so provides because Dalia's evidence of the defense was too weak to persuade a rational jury.

Dalia also complained that the trial court erroneously barred the introduction of the quarantine handling course work that Pete successfully completed. The record shows that defense counsel made an offer of proof, but sheds no light on Pete's assertion that the trial court ruled on the

basis of Evidence Code §352's provision that cumulative evidence may be excluded.

Dalia asserts that the basis for ruling was the trial court's failure to understand the business records exception to the hearsay rule. To bolster the argument, Dalia refers to a point later in the trial in which the trial court also barred a related piece of evidence by explaining the business records exception in a clearly erroneous manner. Though the record contains the mistaken explanation, it does not reveal an offer of proof for this evidence. Since the jury deliberated for nine days, both sides admit that the case was close.

For the issues of (1) the failure to allow a defense, and (2) the exclusion of Dalia's evidence, discuss:

- A the scope of review;**
 - B. the standard of review for whether the trial court erred;**
 - C. how the court will view the evidence if it finds legal error.**
-

Sample Question #5 – Civil

Pam was the Chief Financial Officer (CFO) of Dabco. Pam retained Potter as her lawyer to sue Pam's former employer, Dabco, for wrongful termination and wrongful denial of stock options. During her two-week jury trial, Pam testified that, three years prior, when she was age 56, she had been awarded options to buy 100,000 shares of Dabco stock at \$1 per share. The options were scheduled to vest in January 2003. However, she was fired from her job in December 2002.

Pam testified that she was awarded the stock options based upon her excellent performance as CFO of Dabco: Dabco's stock had risen 47 percent in 1997, 38 percent in 1998, and 41 percent in 1999. Potter asked Pam on direct examination about Pam's age as compared to the ages of other officers of Dabco. The Court sustained defense counsel's objection based on relevance. Thereafter, Dabco's president testified, without objection, that Dabco's stock price dropped precipitously in 2001 – it dropped 63 percent. In the year 2002, Dabco stock went down another 64 percent. Dabco's president testified further, without objection, that he fired Pam because, "she was mean and nobody liked her."

In addition to standard BAJI jury instructions

regarding the wrongful discharge cause of action, both sides requested special instructions regarding the wrongful deprivation of stock options cause of action. Potter and defense counsel engaged in lengthy, formal arguments to the Court over jury instructions regarding the stock options, all of which were off the record and took place in the judge's chambers. Potter argued that the "options" instructions that had been proposed by Dabco were "too long," "too complex," and "had gaps." Thereafter, the judge asked Potter, "Do you have any other objections to the stock options instructions?" Potter said he had no further objections. The judge gave all of the stock option instructions proposed by defense counsel and gave none of the instructions that had been proposed by Potter.

The jury returned a special verdict in favor of Dabco on both causes of action.

On August 20, 2003, Pam has an appointment with you, a Certified Appellate Specialist. You are aware of a new California Supreme Court decision stating that in "wrongful denial of stock option cases" the jury must be instructed in a way that does not conform with the instructions the judge had given in this case.

Pam insists that the Court erroneously allowed the Dabco president to testify about the steep drop in stock prices in 2001 and 2002 because this testimony "ruined her wrongful termination case and was irrelevant because the drop was caused by general market conditions." Pam also claims the court erred in refusing to allow her to testify that she was older, by 15 years, than the other company officers since the crux of her case was that Dabco wanted to replace Pam with someone younger.

Advise Pam about the strengths and weaknesses of the three appellate issues she has brought to your attention:

- A. jury instructions on stock options;**
- B. evidence of the decline of stock prices;**
- C. exclusion of "age" evidence.**

Sample Question #6 – Civil

A bench trial resulted in the finding that David committed battery by throwing a baseball at Victor. Now that the notice of appeal has been filed, you have agreed to represent David on appeal. Prior to your first meeting, you have had an opportunity to review the appellate record. Your discussion with David proceeds as recounted below. (The italicized portions of the dialogue represent your notes on the appellate record and a subsequent discussion with trial counsel.)

David: I was wronged! That judge was totally biased against me. In her tone of voice. And the way she glared at me. She was out to get me!

Appellate record notes: The record suggests that the trial judge did not "like" David.

David: But that wimpy trial attorney of mine, he never did anything about all of those insulting stares or the way she overruled more of his objections than the other side's.

You: Anything else?

David: Can you believe that Victor admitted that he had told his best friend that he was looking forward to getting rich from suing me?

You: David, I'm sorry, but the reporter's transcript says that he answered "no" to that question by your trial attorney. I've read the whole record.

David: . . . no way, that's got to be a typo or something. He said, "yes."

Appellate record notes: A discussion with trial counsel confirms David's statement.

You: What I don't understand, is why your attorney never introduced evidence that Victor's house is too far away from the baseball field for you to have thrown a ball that far.

David: Why bother? Everyone knows that the baseball field is nearly a mile away from Victor's house where he claims to have been hit. Heck, you can see the distance from the courthouse steps!

Appellate record notes: Trial counsel explains that her investigation of the scene of the incident showed that the baseball field is two blocks from Victor's house.

You: Do you know what Dr. Goodwin was supposed to testify about?

David: Oh him. Yeah, my attorney called him to testify that Victor's injury could not have been caused by a flying baseball, but only something like a bullet. That wimp didn't put up much of a fight when the court denied the only motion made in open court. This is the story of my life, I always get wronged.

Based on the foregoing dialogue and notes:

- A. identify each appealable and non-appealable issue.**
- B. If the issue is non-appealable, explain why. If appealable, explain any steps you need to take to ensure that the appellate court can consider the issue.**
- C. Explain what others – such as the courts, clerks, and attorneys involved in the case – may need to do in response.**

Sample Question #1 – Criminal

John was charged with the murder of his neighbor, Ted. At trial, testimony was presented that John and Ted argued constantly as neighbors. During their arguments, Ted often threatened serious injury to John. One morning, the two got into a heated argument over John's leaf blowing because Ted accused John of blowing leaves onto his property. During the argument, Ted yelled to John, "I've got something for you John," and went inside his house. Soon Ted returned outside with a long and shiny object in his hands. Fearing that Ted was going to kill him, John pulled a gun from his back pocket and shot Ted four times, killing him. As it turned out, Ted was holding his own new silver gas blower.

The jury was instructed on self-defense and defense of property over defense objection. During his closing argument, John's attorney argued that John acted in self-defense because of Ted's prior threats and therefore John had a right to act quicker and harsher when he saw Ted holding what looked like a rifle.

After two days of deliberations, several members of the jury told the court that they did not believe two of the jurors were properly deliberating

because they failed to see reason and were too focused on Ted's prior threats rather than more important testimony. Several jurors complained that "the persons that had some doubt owed it to the others to state why they still had doubt." There were complaints that two jurors kept referring to their own personal experiences with neighbors rather than the facts. Some jurors were also upset that several members kept using their cell phones while deliberating.

Defense counsel asked the Court to inquire about the "cell phone problem," but the Court ignored counsel and told the jurors to "go back there and try and urge your positions." The Court then instructed, without objection, on her "philosophy" of deliberations. The Court instructed that it was the jury's duty to determine questions of fact based solely on the evidence presented in court, uninfluenced by passion, prejudice or pity. The Court informed the jurors that their individual backgrounds and experiences make up part of their ability to reason, but that's where it stops. The jurors returned to deliberations and reached a verdict twenty minutes later, finding John guilty of first-degree murder.

Following the trial, defense counsel later moved for a new trial arguing that the verdict had been coerced because of the Court's instruction on philosophy of deliberations and jury misconduct because some jurors used cell phones during deliberations. The motion for new trial was denied.

- A. Was there Ineffective Assistance of Counsel for arguing that the jury could acquit appellant of murder because of Ted's prior threats? Discuss.**
- B. Was the jury misconduct issue preserved for appeal? Discuss.**
- C. Should the new trial motion have been granted on the grounds of juror coercion? Discuss.**

Sample Question #2 – Criminal

Assume the legislature passed a sentencing enhancement statute stating that proof of a blood alcohol (BA) content of .10 is sufficient to presume impaired driving, and that anyone found guilty of intentionally driving with a .10 or above BA content shall be sentenced to state prison for seven years in addition to the punishment prescribed for the underlying crime.

Ryan was charged with second degree murder and drunk driving. At trial, a criminalist testified that she tested Ryan's blood and determined that the BA content was .11. Consistent with the new statute, the jury was instructed that it could presume Ryan's driving was impaired because of the BA content. Defense counsel did not object to the instruction and stipulated that the wording of the instruction was correct. Counsel did request that the jury be instructed on whether Ryan intentionally drove a vehicle with a BA content of .10 or above, but the court refused the instruction.

Ryan was convicted of second degree murder and drunk driving, and was sentenced to a term of 22 years to life. The drunk driving conviction was stayed pursuant to Penal Code §654.

- A. Is a challenge to the instruction preserved for appeal? Discuss.**
- B. Is the instruction a proper presumption instruction? Discuss.**
- C. Did the trial court err in denying the request to have the jury instructed on the enhancement? Discuss.**

Sample Question #3 – Criminal

A jury found that Dalia unlawfully sold quantine, a very dangerous chemical, to Pete, who was severely injured when he failed to take the necessary precautions to handle the material safely. Dalia appeals from the judgment, contending that the trial court erred in precluding her to present a defense focusing on the fact that Pete had passed the safety course necessary to become a licensed quantine hauler. When precluded from tendering the defense, Dalia's counsel became extremely irate and ranted that the statute contemplated exactly such a defense. Defense counsel was nearly sanctioned during the tirade on how the court's ruling was unfair, violated due process, and essentially ended the case for Dalia. Deterred by the threat of sanction, defense counsel did not renew the objection when the trial court failed to instruct on this defense. The respondent's brief argues that it is irrelevant whether the statute so provides because Dalia's evidence of the defense was too weak to persuade a rational jury.

Dalia also complains that the trial court erroneously barred the introduction of the quantine

handling course work that Pete successfully completed. The record shows that defense counsel made an offer of proof, but sheds no light on Pete's assertion that the trial court ruled on the basis of Evidence Code §352's provision that cumulative evidence may be excluded.

Dalia asserts that the basis for ruling was the trial court's failure to understand the business records exception to the hearsay rule. To bolster the argument, Dalia refers to a point later in the trial in which the court also barred a related piece of evidence by explaining the business records exception in a clearly erroneous manner. Though the record contains the mistaken explanation, it does not reveal an offer of proof for this evidence. Since the jury deliberated for nine days, both sides admit that the case was close.

For the issues of (1) the failure to allow a defense, and (2) the exclusion of Dalia's evidence, discuss:

- A. the scope of review.**
- B. the standard of review for whether the trial court erred.**
- C. how the court will view the evidence if it finds legal error.**

Sample Question #4 – Criminal

The appellate records reveal all of the following facts. Information filed in the California Superior Court charged Andy with four counts of first-degree burglary in addition to an allegation of a prior conviction for first-degree burglary.

Defense counsel filed a motion to suppress highly incriminating statements on grounds that the police violated Andy's Fourth Amendment rights by eavesdropping on cell phone conversations in which Andy bragged to his girlfriend about his prowess in committing a spree of burglaries. In support, defense counsel relied on recent Ninth Circuit case law holding that cell phone conversations—though easily monitored—carry a reasonable expectation of privacy and thus require a warrant. The Superior Court, however, denied the suppression motion on the basis of California Supreme Court precedent holding that cell phone conversations are so easily picked up by ordinary radio receivers that there is no Fourth Amendment right to privacy.

Sensing a really good legal issue, defense counsel urged Andy to plead guilty in order to raise the issue in the California Court of Appeal. When the prosecution offered a deal in which Andy would admit one burglary in exchange for dismissal of the other three charges, Andy acquiesced to the deal when it came to include a five-year prison maximum. When presented with the terms of the plea, the trial court noted that the deal was in Andy's best interest because he did not really have much of a defense if the suppression motion was not granted.

After being properly advised of his rights to a jury trial, confrontation, and against self-incrimination, Andy waived those rights and admitted the burglary and the prior conviction. At sentencing, the trial court imposed a three-year sentence for the burglary that was doubled pursuant to the Three Strikes law. Andy immediately regretted his plea and asked the superior court to hear his appeal immediately. The trial court explained that appeal was to the Court of Appeal. Andy was remanded to custody and, after several months, inquired about the appeal. Defense counsel never responded, but Andy did find out that notice of appeal had never been filed.

Andy now files a petition for writ of *habeas corpus* in the California Court of Appeal in *pro per* that complains of:

- his anger at defense counsel's failure to file a notice of appeal;
- the denial of the motion to suppress;
- the fact that no one told him that he would be deported from the United States because he is not a citizen; and
- the fact that he received more time than he bargained for.

- A. May the appellate court consider Andy's complaint about the failure to file the notice of appeal since the time to appeal has expired? Why or why not? Discuss.**

Assume for B, C, & D that the notice of appeal was timely filed and that the matter is before the Court of Appeal on direct appeal with appointed appellate counsel.

- B. Does the appellate court have power to reverse a suppression motion ruling after Andy admitted his guilt and before the California Supreme Court overrules its holding? Discuss.**

Assume for C & D that a certificate of probable cause was timely issued on the following issues:

- C. May the appellate court reverse on Andy's assertion that he would not have accepted a plea if he had known it would result in deportation? Discuss.**
- D. How should the Court of Appeal resolve the claim that Andy was sentenced to a greater term than was called for in the negotiated plea? Discuss.**

Sample Question #5 – Criminal

As she is walking down the street on the way to work, Patty accidentally bumps into Dennis. Enraged by this indiscretion, Dennis throws a cup of hot coffee onto Patty, who then staggers backwards and falls into the street where she is struck by a passing motorist, sustaining serious injuries. Dennis, thereafter, is arrested and charged with battery.

The jury is instructed following the presentation of evidence. After two days of deliberations, the jury determines that it is split 11-1 in favor of the prosecution. At this time, both Juror Number 1 and Juror Number 2 indicate that, based on their religious beliefs, they do not believe they can sit in judgment of another person. The judge then instructs all jurors that they are to base their decision on the evidence and the Court's instructions alone. Juror Number 1 agrees to do so; Juror Number 2, however, indicates that she believes that she has to follow God's law. Defense counsel moves for a mistrial, but the Court instead chooses simply to replace Juror Number 2 with Alternate Juror Number 1. Shortly after replacing Juror Number 2, the jury returns a 12-0 verdict in favor of the prosecution.

After the verdict, but before sentencing, the Jury Foreperson (Juror Number 4) informs the Court that, before the jury had deadlocked, Juror Number 3 visited the intersection where the battery allegedly occurred and told the rest of the jury panel that it was extremely unlikely that the incident could have happened as Patty testified. This issue is properly raised in defendant's motion for new trial, which is denied by the trial court.

At the conclusion of the case, Juror Number 4 telephones defense counsel and indicates that,

during deliberations, he had done some research on the internet and found a newspaper article that said Dennis had suffered a prior conviction for assault with a deadly weapon in a highly publicized case. Juror Number 4 states that he did not share this information with the remaining jurors, but that he was not sure whether it affected his decision.

Assume a timely notice of appeal has been filed.

As to Jurors Number 1 through 4:

- A. Identify each claim of error and discuss whether each may be considered on direct appeal.**
- B. Identify the appropriate standard of review. Discuss.**
- C. Briefly analyze whether each claim of error is likely to succeed. Discuss.**

Sample Question #6 – Criminal

A bench trial resulted in the finding that David committed battery by throwing a baseball at Victor. Now that the notice of appeal has been filed, you have agreed to represent David on appeal. Prior to your first meeting, you have had an opportunity to review the appellate record. Your discussion with David proceeds as recounted below. (The italicized portions of the dialogue represent your notes on the appellate record and a subsequent discussion with trial counsel.)

David: I was wronged! That judge was totally biased against me. In her tone of voice. And the way she glared at me. She was out to get me!

Appellate record notes: The record suggests that the trial judge did not "like" David.

David: But that wimpy trial attorney of mine, he never did anything about all of those insulting stares or the way she overruled more of his objections than the other side's.

You: Anything else?

David: Can you believe that Victor admitted that he had told his best friend that he was looking forward to getting rich from suing me?

You: David, I'm sorry, but the reporter's transcript says that he answered

“no” to that question by your trial attorney. I’ve read the whole record.

David: . . . no way, that’s got to be a typo or something. He said, “yes.”

Appellate record notes: A discussion with trial counsel confirms David’s statement.

You: What I don’t understand, is why your attorney never introduced evidence that Victor’s house is too far away from the baseball field for you to have thrown a ball that far.

David: Why bother? Everyone knows that the baseball field is nearly a mile away from Victor’s house where he claims to have been hit. Heck, you can see the distance from the courthouse steps!

Appellate record notes: Trial counsel explains that her investigation of the scene of the incident showed that the baseball field is two blocks from Victor’s house.

You: Do you know what Dr. Goodwin was supposed to testify about?

David: Oh him. Yeah, my attorney called him to testify that Victor’s injury could not have been caused by a flying baseball, but only something like a bullet. That wimp didn’t put up much of a fight when the court denied the only motion made in open court. This is the story of my life, I always get wronged.

Based on the foregoing dialogue and notes:

- A. Identify each appealable and non-appealable issue.**
- B. If the issue is non-appealable, explain why. If appealable, explain any steps you need to take to ensure that the appellate court can consider the issue.**
- C. Explain what others – such as the courts, clerks, and attorneys involved in the case – may need to do in response.**